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Federal Communications Commission
Office of Secretary

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MM Docket No. 04-20
Table of Allotments,)	RM-10842
FM Broadcast Stations)	RM-11128
(Cambridge, Newark, St. Michaels, and Stockton,)	RM-11129
Maryland and Chincoteague, Virginia))	RM-11130

To: The Secretary
Attn: Media Bureau

SUPPLEMENT TO PETITION FOR RECONSIDERATION

CWA Broadcasting, Inc. ("CWA"), the licensee of Station WINX-FM, Cambridge, Maryland (the "Station" or "WINX"), by its attorneys, hereby supplements its Petition for Reconsideration ("Petition") of the decision of the Media Bureau ("Bureau") in the above-referenced proceeding,¹ in which the Bureau denied CWA's petition to modify WINX's community of license to its original community of license, Cambridge, Maryland, and to upgrade its operation to Class B1 on Channel 232 (CWA's Cambridge Proposal"), and instead allotted Channel 235A to Newark, Maryland and Channel 233A to Chincoteague, Virginia in response to counterproposals submitted by MTS Broadcasting, L.C. licensee of Station WCEM-FM, Cambridge, Maryland, and Dana Puopolo, respectively. In this Supplement, CWA wishes to disclose its discovery of certain facts, in Bureau documents obtained by CWA pursuant to a Freedom of Information Act ("FOIA") request, of central relevance to CWA's Cambridge

¹ *Cambridge, Newark, St. Michaels, and Stockton, Maryland and Chincoteague, Virginia, Report and Order, DA 05-3101, released December 2, 2005 ("R&O").*

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Proposal, facts that the Bureau failed to take into account when rendering its decision in the *R&O*. In support thereof, CWA states as follows.

As noted in CWA's Petition, in rejecting CWA's Cambridge Proposal, the Bureau cited the technical feasibility of the upgrade from Channel 232A to Channel 232B1 at St. Michaels, Maryland, thereby assuming that CWA could operate a B1 facility at St. Michaels and that the rulemaking change requested by CWA was not necessary. *See R&O* at ¶ 5, n. 14. CWA's engineer reached the opposite conclusion, namely that the 232B1 allotment at St. Michaels was not technically feasible.² In view of this discrepancy, on December 27, 2005, CWA submitted a FOIA request seeking documents relating to the Bureau's determination that there were no technical impediments to a Channel 232B1 upgrade at St. Michaels (FOIA Control No. 2006-121).

On January 26, 2006, the Bureau responded to CWA's request with documents and staff studies prepared in connection with the Bureau's preliminary engineering review of a Channel 232B1 St. Michaels upgrade ("FOIA Response"). In a document included in the FOIA Response, entitled "Info for Reallotment of Station WINX-FM from St. Michaels, MD back to Cambridge, MD," and attached hereto as Exhibit "A," a staff engineer concluded as follows:

In case anyone is interested, I found that Channel 232B1 will not work at St. Michaels, MD. The site restriction for such an allotment would have to be at least 30.7 km south of St. Michaels. The 70 dBu contour for a Class B1 facility extends out only 23.2 km.

FOIA Response at 14. As the quoted text demonstrates, the Bureau's own staff engineer had provided an accurate analysis (for "anyone...interested") of the technical obstacles to the

² As set forth in the Engineering Statement to CWA's Petition, based on the nearest available Channel 232B1 reference point to St. Michaels, the Station's 232B1 operation at St. Michaels would fail to comply with the Commission's city grade coverage requirements. *See* Engineering Statement at 1-2, Figure 1.

Channel 232B1 upgrade at St. Michaels in direct conflict with the erroneous assumption of technical feasibility the Bureau ultimately relied upon in the *R&O*. In mistakenly assuming the technical feasibility of the Channel 232B1 St. Michaels upgrade in the *R&O*, the Bureau failed to include the findings of its own engineer in its decision making process, and this missing information is obviously relevant to a consideration of the relative merits of the St. Michaels and Cambridge allotments. Because a Channel 232B1 allotment is not possible at St. Michaels, the public interest would best be served by reallocating Channel 232B1 to Cambridge, or, in the alternative, to Oxford, Maryland.³

In the same document, the Bureau's staff engineer also determined that CWA's Cambridge Proposal would result in a net gain of 2,310 persons and 1,833 square km, and that a number of gain areas presently received less than five full-time services, including 1,184 persons and 10 square km receiving only one full-time service (gray area). *See id.* at 13-14.⁴ Such gains are obviously relevant to a thorough consideration of the merits of an allotment proposal. Given these public interest gains, the Bureau should have approved CWA's Cambridge Proposal. However, as noted in CWA's Petition, the Bureau failed to address these gains in the *R&O*.

³ *See* Petition at 16-17 for a discussion of CWA's alternative proposal to reallocate Channel 232B1 to Oxford, Maryland (the "Oxford Proposal").

⁴ The gain calculations of CWA's engineer are set forth in the Petition as well as in previously-filed Reply Comments, submitted by CWA on December 27, 2004. According to CWA's engineer, CWA's Cambridge Proposal would produce a net gain in service of 2,236 square kilometers and 99,186 persons. Included in this gain in service is service to underserved areas and populations. Exhibit A to CWA's Reply Comments shows that the total underserved gain area consists of 1,484 square kilometers and 57,339 persons. This consists of: (a) a second reception service to 1,106 persons in 276 square kilometers, (b) a third reception service to 4,536 persons in 283 square kilometers, (c) a fourth reception service to 3,915 persons in 283 square kilometers, and (d) a fifth reception service to 47,782 persons in 642 square kilometers. Finally, as noted in Exhibit A to CWA's Reply Comments, the proposed change in the allotment will result in service by the Station to 168,095 persons in 2,744 square kilometers of land area. Neither CWA's gain calculations nor those of the Bureau's staff engineer are factored into Bureau's decision in the *R&O*.

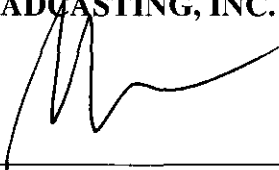
In the Petition, CWA discussed at length how the Bureau breached the standards of reasoned agency decision making by ignoring substantial evidence submitted on the record by CWA.⁵ As the FOIA Response demonstrates, the Bureau equally ignored relevant information developed by its own staff. The Bureau had important technical data at its disposal, provided by internal sources, to assist it in making a well-informed and fully-considered decision in this proceeding. The Bureau's failure to take this information into account in reaching its decision is arbitrary and capricious, and the *R&O* should be reversed. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983); *Am. Tel. and Tel. Co. v. FCC*, 974 F.2d 1341, 1354 (D.C. Cir. 1992) (agency acted arbitrarily and capriciously by failing to provide reasoned explanation supported by record). Upon proper consideration of all the available evidence, it is clear that CWA's Cambridge Proposal, or, in the alternative, its Oxford Proposal, is in the public interest and should be promptly granted.

⁵ *See* Petition at pp. 3-6. The Commission has previously set aside decisions that "ignored record evidence relevant to the issues designated for investigation and lacked sufficient analytical foundation for the findings reached," and must do so here. *Western Union Telegraph Company*, 95 FCC 2d 881, 920 (1983).

WHEREFORE, for the foregoing reasons, CWA Broadcasting, Inc. respectfully requests that the Commission reverse the decision of the Media Bureau denying CWA's proposal to modify Station WINX-FM's community of license from St. Michaels, Maryland to its original community of license, Cambridge, Maryland and upgrade its operation to Class B-1 on Channel 232, and instead allotting Channel 235A to Newark, Maryland in response to a counterproposal submitted by MTS Broadcasting, L.C., or, in the alternative, change WINX's community of license to Oxford, Maryland and allot Channel 232B1 to Oxford.

Respectfully submitted,

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February 10, 2006

EXHIBIT A

Info for Reallotment of Station WINX-FM
from St. Michaels, MD back to Cambridge, MD:

CWA Broadcasting, Inc. proposes the reallotment of Station WINX-FM from St. Michaels, MD (present site: 38-49-17; 76-17-27) back to its original community of license, at Cambridge, MD (proposed site: 38-29-39; 76-13-21), and to upgrade the station from Channel 232A to Channel 232B1. The St. Michaels facility was never issued a license, nor was it ever built, and thus, it never began operation.

The loss area of Channel 232A at St. Michaels, MD contains 125,373 people and covers 804 square km of land area.

The gain area of Channel 232B1 at Cambridge, MD contains 127,683 people and covers 2,637 square km of land area.

This would produce a net gain of 2,310 people and 1,833 square km of land area being served.

The entire loss area of Channel 232A at St. Michaels is completely covered by at least five other existing full-time services, and thus, it is a well served area.

There are a few small sections of the gain area of Channel 232B1 at Cambridge which are presently receiving less than five

full-time services. The following is the present status of the underserved area within the gain area:

The area receiving only four full-time services contains 13,056 people and covers 224 square km of land area.

The area receiving only three full-time services contains 11,382 people and covers 181 square km of land area.

The area receiving only two full-time services contains 2,808 people and covers 70 square km of land area.

The area receiving only one full-time service (gray area) contains 1,184 people and covers 10 square km of land area.

No white area exists in the gain area.

Neither the existing Ch. 232A facility at St. Michaels, nor the proposed Ch. 232B1 facility at Cambridge cover any part of any urbanized area with the 70 dBu contour.

St. Michaels, MD does not have any other local transmission services.

Cambridge, MD has two other local transmission services - Station WCEM-FM, Ch. 292A, and AM Station WCEM, 1240 kHz, day & night.

Populations from 2000 Census:

St. Michaels, MD - 1,193

Cambridge, MD - 10,911

In case anyone is interested, I found that Channel 232B1 will not work at St. Michaels, MD. The site restriction for such an allotment would have to be at least 30.7 km South of St. Michaels. The 70 dBu contour for a Class B1 facility extends out only 23.2 km.

Jeff

2/5/03

CERTIFICATE OF SERVICE

I, John C. Butcher, hereby certify that I have served on this 10th day of February, 2006, a copy of the foregoing **Supplement to Petition for Reconsideration** upon the following parties by first-class mail, postage pre-paid:

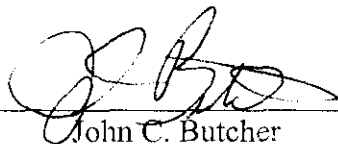
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